

1 J. TONY SERRA #32639
CURTIS L. BRIGGS #284190
2 TYLER R. SMITH #289188
506 Broadway
3 San Francisco CA 94133
Telephone: 415/986-5591

4 Attorneys for Defendant
5 KWOK CHEUNG CHOW
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7

8 UNITED STATES DISTRICT COURT
9 NORTHERN DISTRICT OF CALIFORNIA
10

11 UNITED STATES OF AMERICA,

14-CR-196 CRB

12 Plaintiff,

13 v.

NOTICE OF MOTION AND MOTION TO
UNSEAL GRAND JURY PROCEEDING
ON THE THIRD SUPERCEDING
INDICTMENT

14 KWOK CHEUNG CHOW, aka
RAYMOND CHOW,

15 Defendant
16 _____/

Date: November 9, 2015
Time: 8:30 a.m.
Dept: Judge Breyer

17 TO THE CLERK OF THE ABOVE-ENTITLED COURT AND TO THE UNITED
STATES ATTORNEY FOR THE NORTHERN DISTRICT OF CALIFORNIA:
18

19 PLEASE TAKE NOTICE that on the date and at the time
20 indicated above, defendant KWOK CHEUNG CHOW, by and through
21 counsel, will and hereby does move the Court for an order
22 unsealing the grand jury proceedings that held Mr. Chow to
23 answer for the charges brought by the Government in the Third
24 Superceding Indictment. The Government's submission of evidence
25 supporting charges of solicitation of murder by Chow, as
26 thereafter charged in the superceding Indictment, relied
27 substantially and significantly on known untrustworthy and
28 unreliable informants. It was the same persons who testified in

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1 the grand jury proceedings, and the Government knew at the time
2 of the testimony that these persons had clear and identified
3 motives to lie during the grand jury proceedings.

4 Defendant therefore requests the unsealing of the grand
5 jury proceeding on the Third Superseding Indictment.

6 This motion is based on this notice, the attached
7 memorandum of points and authorities and supporting declaration
8 of counsel, the files and records herein, and such additional
9 evidence and/or authorities as may be hereafter presented.

10 Dated: November 6, 2015

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/s/ CURTIS BRIGGS

J. TONY SERRA

CURTIS BRIGGS

TYLER SMITH

Attorneys for Defendant

KWOK CHEUNG CHOW

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MEMORANDUM OF POINTS AND AUTHORITIESSTATEMENT OF THE CASE

More than eighteen months after the initial Indictment against Kwok "Raymond" Chow and two weeks before trial was set to start, the Government indicted Raymond Chow in the Third Superceding Indictment on October 15, 2015; charges include: 18 U.S.C. section 1962(d), conspiracy to conduct the affairs through a pattern of racketeering activity; 18 U.S.C section 1959(a)(1), murder in aid of racketeering; 18 U.S.C. section 1959(a)(5), conspiracy to commit murder in aid of racketeering; 18 U.S.C section 1956, money laundering; and 18 U.S.C. section 371, conspiracy. (Doc. 1072).

Despite the fact that no additional facts have surfaced, the Government submits threads of attenuated evidence of solicitation to commit murders by defendant Chow. (Doc. 1059). To support the new charges, the Government relies heavily and erroneously on unreliable witnesses: Andy Li, Cam Wong and Joe Chanthavong. By information and belief, these same witnesses were presented to the grand-jury. Unsealing and disclosure of the grand-jury proceedings of the Third Superseding Indictment is critical, and warranted under Fed. Crim. Proc. Rule 6 to promote justice and to determine the reliance on unreliable witnesses; safeguards taken to advise and warn the grand-jury of the witnesses' credibility; and to the extent such measures were not taken, disclosure is necessary to examine prosecutorial misconduct and due process violations.

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STATEMENT OF FACTS

On information, belief and deduction, defense asserts herein that the Government put on witnesses at the Grand Jury proceeding that were unreliable, with motives to lie to this Court, including but limited to Andy Li; Cam Wong and Joe Chanthavong. These witnesses, by the Government's own proclamation, are dangerously untrustworthy and offering up their testimony without precautionary safeguards and warnings amounts to an abuse of the grand-jury proceedings, a violation of defendant's due process rights and prosecutorial misconduct. An essential component of the Government's support of charges substantiating the third indictment, which defense submits is not based on new evidence or changed circumstance, is the reliance on Andy Li, whom, on information and belief, defense believes testified at the grand-jury proceedings.

The Government characterized and attributed the following to Andy Li:

[D]efendant has knowingly submitted false declarations to this Court in his effort to gain release (Doc. 462, 1: 11-13);

That defendant will say or do anything to try to get out of jail should give the Court great pause about releasing him. If a person cannot be trusted to give the Court straight information, that person cannot be trusted to comply with the Court's conditions and directions. (Doc. 462, 3: 25-27);

In short, the declarations provided by the defendant are incredible and inconsistent because they are false. According to the defendant himself, it would appear that the Officer and defendant's wife are highly compromised and should be given minimal credibility by this Court. It also is clear that defendant filed declarations from his wife and the Officer that he knew were false. Again, defendant's efforts to weave

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1 illogical stories with compromised witnesses
2 demonstrate that the defendant is not
straight with the Court." (Doc. 462, 6:18-23); and

3 [D]efendant's argument is simply nonsensical.
4 (Doc. 8:11).

5 By the Government's own proclamations, Andy Li presented
6 false declarations and he is "incredible," "inconsistent,"
7 "illogical," "nonsensical," and wholly "untrustworthy."

8 Second, on information and belief, defense contends that
9 CW.C. testified at the grand-jury proceedings. Defense asserts
10 that CW.C.

11 The Government purports in its' submission to this Court
12 supporting the Third Superceding Indictment that CW.C. set forth
13 the events and circumstances directly related to the murder of
14 Allen Leung, although he wholly lacks credibility and the
15 Government readily admitted so. The Government stated that
16 Individual C is a Government informant, a former Hop Sing Tong
17 member, and he is serving a lengthy prison term for murdering a
18 rival gang member and another individual. He is cooperating and
19 testifying against Chow because he is embittered that Chow and
20 CW.A. did not provide sufficient legal support for his case.
21 (Doc. 1059, 4: 4-10).

22 It is defense's belief that CW.C. testified that he
23 followed CW.A.'s orders and CW.A. followed Chow's orders. He
24 testified that CW.A. asked him to murder Leung, and his
25 initially agreed and then declined because it was too close to
26 his work. (Doc. 1059, 5: 5-16). A day or two prior to the
27 murder, CI.C. stated that he picked up two men, CW.D. and CW.E.
28 and brought them to a meeting with CW.A. and Chow.

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1 CW.C. further stated that on February 2, 2006, he drove CW.
2 D. and E. to Chinatown, where they got out of the car and after
3 sometime returned. After they drove away, the men broke down two
4 guns and threw them over the Bay Bridge into the San Francisco
5 Bay. (Doc. 1059, 6: 1-10).

6 Critically, the Government admits that CW.C. is not a
7 trustworthy witness and he set forth "various different
8 iterations" of the murder. The inconsistencies range from the
9 number of persons in the car, to how the events unfolded, to the
10 extent of his involvement. The Government confirms that CW.C.
11 gave false information about CW.A. being the shooter and a
12 polygraph revealed further deception as to whether or not he was
13 the shooter. (Doc. 1059, 6: 19-20; and footnote 6).

14 Likewise, Kongphet Chanthavong, is a cooperating witness
15 with significant motive to lie in light of his plea agreement.
16 (Doc 1059, 1: 25-27).

17 In this case, disclosure of the grand-jury proceedings is
18 necessary and warranted. In supporting the charges herein, the
19 Government relied heavily on the theory that Raymond Chow
20 orchestrated a racketeering enterprise; yet, the Government
21 relies not on direct evidence, but rather, the lack thereof, to
22 support its theory. In supporting the charges in the Third
23 Superseding Indictment, the Government relies heavily on
24 admittedly untrustworthy evidence, and contrived guesswork to
25 support allegations that Raymond Chow solicited the murders of
26 Allen Leung and Jim Tat Kong.

27 Therefore, unsealing and disclosure of the grand-jury
28 proceedings is warranted in this case in the interests of

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1 justice, and to address questionable due process violations as
 2 well as prosecutorial misconduct.

3 **ARGUMENT**

4 I

5 DISCLOSURE OF THE GRAND-JURY PROCEEDINGS, RESULTING IN
 6 THE THIRD SUPERSEDING INDICTMENT, MUST BE DISCLOSED TO
 7 THE DEFENDANT

8 Federal Rule of Criminal Procedure Rule 6 states that the
 9 court "may authorize disclosure—at a time, in a manner, and
 10 subject to any other conditions that it directs—of a grand-jury
 11 matter ... at the request of a defendant who shows that a ground
 12 may exist to dismiss the indictment because of a matter that
 13 occurred before the grand jury[.]" Fed Rule of Criminal
 14 Procedure Rule 6(e)(3)(E)(ii). Moreover, the "court must afford
 15 a reasonable opportunity to appear and be heard to "the parties
 16 to the judicial proceeding." Fed Rule of Criminal Procedure Rule
 17 6(e)(3)(F)(ii).

18 Under Fed Rule of Criminal Procedure Rule 6(e)(6):
 19 "Records, orders, and subpoenas relating to grand-jury
 20 proceedings must be kept under seal to the extent and as long as
 21 necessary to prevent the unauthorized disclosure of a matter
 22 occurring before a grand jury," and this rule continues the
 23 traditional practice of secrecy on the part of members of the
 24 grand jury, except when the court permits a disclosure and
 25 courts have long recognized that grand-jury disclosure is
 26 appropriate in certain circumstances.

27 The Supreme Court of the United States has confirmed the
 28 trial court's power under Rule 6 (e) of the Federal Rules of
 Criminal Procedure to direct disclosure of grand jury testimony

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1 "preliminarily to or in connection with a judicial proceeding."
 2 Dennis v. United States, 384 U.S. 855, 869-870 (U.S. 1966).

3 In United States v. Socony-Vacuum Oil Co., 310 U.S. 150,
 4 234, the Court acknowledged that "after the grand jury's
 5 functions are ended, disclosure is wholly proper where the ends
 6 of justice require it." 310 U.S. 150, 234 (U.S. 1940); *see also*
 7 After an indictment has been found and the accused apprehended,
 8 the veil of secrecy surrounding grand jury proceedings may
 9 safely be lifted where justice so requires. Metzler v. United
 10 States, 64 F.2d 203, 206 (9th Cir. Cal. 1933); other districts
 11 followed such line of reasoning: United States v. Amazon
 12 Industrial Chem. Co., D.C.Md., 55 F.2d 254, 261; United States
 13 v. Perlman, D.C.S.D., N.Y., 247 F. 158, 160; Atwell v. United
 14 States, 4 Cir., 162 F.97, 17 L.R.A.,N.S., 1049, 15 Ann.Cas. 253.
 15 Rule 6(e) of the New Federal Rules of Criminal Procedure also
 16 recognizes, at least by implication, that the court has power
 17 'in connection with a criminal proceeding' to compel disclosure
 18 of matters occurring before the grand jury. United States v.
 19 Alper, 156 F.2d 222, 226 (2d Cir. N.Y. 1946).

20 The burden is on the defense to show that "a particularized
 21 need" exists to unseal the grand-jury proceedings, which
 22 outweighs the policy of secrecy. Pittsburgh Plate Glass v. U.S.,
 23 360 U.S. 395, 400-405 (U.S. 1959): where four members of the
 24 Court concluded that even on the special facts of that case the
 25 witness' grand jury testimony should have been supplied to the
 26 defense, the entire Court was agreed that upon a showing of
 27 "particularized need" defense counsel might have access to
 28 relevant portions of the grand jury testimony of a trial

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1 witness. Id. at 400 and 405; see also Dennis v. United States,
 2 384 U.S. 855, 869-870 (U.S. 1966).

3 Moreover, in Procter & Gamble, 356 U.S. 677 (U.S. 1958),
 4 the Court stated that "problems concerning the use of the grand
 5 jury transcript at the trial to impeach a witness, to refresh
 6 his recollection, to test his credibility ..." are "cases of
 7 particularized need where the secrecy of the proceedings is
 8 lifted discretely and limitedly." 356 U.S., at 683.

9 In the present case, defendant acknowledges that grand-jury
 10 proceedings are secret in nature in light of tradition, efficacy
 11 and practicality; however, it does not follow that "grand jury
 12 minutes should never be made available to the defense." See
 13 Pittsburgh Plate Glass v. U.S., *supra* at 400.

14 **A. Ends of Justice Require Disclosure**

15 First, "disclosure is wholly proper" because the "ends of
 16 justice require it." Saony-Vacuum Oil Co., *supra* at 234. In the
 17 present case, it is the defense's contention, based on
 18 information and belief, that the Government presented the grand-
 19 jury with witnesses, including Andy Li, Cam Wong, and Kongphet
 20 Chanthavong, whom, by the Government's own proclamations are
 21 "unreliable;" "untrustworthy;" "illogical;" "nonsensical;" and
 22 whom have lied to the Government and to this Court. These are
 23 not simply bias witness leaning towards an altered truth or
 24 offering inconsequential exaggerations. These are highly
 25 motivated, proven liars, with dangerous incentives to offer
 26 misleading and false testimony.

27 Unsealing and disclosure of the grand-jury proceedings is
 28 proper and required by justice to determine if the entire grand-

1 jury was based completely on testimony from these inconsistent
2 and deceitful witnesses.

3 **B. Particularized Need**

4 Second, the defense has shown_show that "a particularized
5 need" exists to unseal the grand-jury proceedings, which
6 outweighs the policy of secrecy. Pittsburgh Plate Glass v. U.S.,
7 *supra* at 400 & 405.

8 In Pittsburgh Plate Glass, the defendants made no showing
9 of any need to unseal the grand-jury proceedings, rather the
10 defendant proceeded as a matter of absolute right, and they
11 "contended only that they had a 'right' to the transcript
12 because it dealt with subject matter generally covered at the
13 trial." *Id.* at 400-401. Conversely, in the present case, Mr.
14 Chow does not claim an absolute right to unseal the grand-jury
15 proceedings, and rather he asserts a particularized and
16 compelling need as the proceedings will reflect the fact that
17 the Government set forth witnesses that they knew were
18 unreliable, untrustworthy, and compelled to act with dishonest
19 motives, whether or not, those same witnesses testify at trial.
20 _____Moreover, if the grand-jury witnesses also testify at
21 trial, the grand-jury testimony must be unsealed to ensure that
22 Mr. Chow may impeach the Government's witnesses on the basis of
23 prior inconsistent statements before the grand jury. As noted in
24 the opinion of Oakes, J., in United States v. Cramer:

25 First since *Dennis v. United States*, 384
26 U.S. 855, 86 S.Ct. 1840, 16 L.Ed.2d 973
(1966), a defendant has been entitled to
27 examine the grand jury testimony of
witnesses against him. On this point, the
Court was unanimous, holding that there was
28 "no justification" for the District of
Columbia Court of Appeals' "relying upon

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[the] 'assumption'" that "no inconsistencies would have come to light." The Court's decision was based on the general proposition that "[i]n our adversary system for determining guilt or innocence, it is rarely justifiable for the prosecution to have exclusive access to a storehouse of relevant facts." In the case at bar the prosecution did have exclusive access to the grand jury testimony of the witness Sager, by virtue of being present, and the defense had none—to determine whether there were any inconsistencies with, say, his subsequent testimony as to damaging admissions by the defendant and his attorney Richard Thaler. The Government claims, and it is supported by the majority here, that there is no problem since defendants were given the benefit of Sager's subsequent statements including these admissions as Jencks Act materials. But assuming this to be true, it does not cure the basic infirmity that the defense could not know whether the witness testified inconsistently before the grand jury.

United States v. Cramer, 447 F.2d 210, 222-223 (2d Cir. N.Y. 1971)

Defendant further points to the following recognized safeguards of recording or transcribing a grand-jury proceeding and highlights that disclosure is necessary herein because 1) the testimony was untrustworthy as set forth above; and 2) the Government engaged in prosecutorial misconduct.

1. Testimony Received in Grand-Jury Proceeding was Untrustworthy

In United States v. Cramer, the court observed: "The recording of testimony is in a very real sense a circumstantial guaranty of trustworthiness. Without the restraint of being subject to prosecution for perjury, a restraint which is wholly meaningless or nonexistent if the testimony is unrecorded, a witness may make baseless accusations founded on hearsay or

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1 false accusations, all resulting in the indictment of a fellow
2 citizen for a crime." Id. at 221.

3 Defense contends that is precisely what occurred in the
4 present matter. The witnesses set forth herein, stood before the
5 grand-jury and made baseless accusations founded on hearsay and
6 false accusations, with no suggested safeguards of trust-
7 worthiness and defendant was held to answer for such crimes.
8 Unsealing of the proceedings is necessary and required to
9 determine such.

10 *2. Restraining Prosecutorial Abuses Before the Grand*
11 *Jury*

12 As noted in United States v. Gramolini:

13 In no way does recordation inhibit the grand
14 jury's investigation. True, recordation
15 restrains certain prosecutorial practices
16 which might, in its absence be used, but
17 that is no reason not to record. Indeed, a
18 sophisticated prosecutor must acknowledge
19 that there develops between a grand jury and
20 the prosecutor with whom the jury is
21 closet[] a rapport—a dependency
22 relationship—which can easily be turned into
23 an instrument of influence on grand jury
24 deliberations. Recordation is the most
25 effective restraint upon such potential
26 abuses.

27 United States v. Gramolini, 301 F. Supp. 39, 41-42 (D.R.I.
28 1969).

29 In the present case, the grand jury was based entirely on
30 hearsay and unreliable witnesses with motives for dishonesty,
31 previous known and acknowledged by the Government.

32 It is imperative that the Government specifically call to
33 the attention of the grand jury the nature of the evidence
34 presented - the grand-jury must be told that the evidence is
35 hearsay and unreliability of the witnesses and courts recognize.

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1 Such precautionary measures taken by the Government is disputed
2 herein and defendant is greatly handicapped by the absence of
3 grand-jury transcript. It is defendant's contention that the
4 whole case was developed before the grand-jury by FBI Agents and
5 the Government at the guise of such deceitful witnesses, and
6 without such, no indictment could have been obtained. It is
7 unclear if the Government gave a general statement as to the
8 grand-jury's treatment of unreliable witnesses and statements
9 based on hearsay, guesswork and conjecture or if specific
10 warnings as to the nature of the evidence presented was given.

11 It is defense's contention that the Government will
12 directly suborn or supervise their team in presenting perjured
13 testimony from Andy Li and the other witnesses. Specifically,
14 Mr. Frentzen has previously argued to this Court in this matter
15 that Andy Li could not be trusted and that he would do and say
16 anything to get out of jail. Obviously, the stakes are much
17 higher for him now that he is facing federal prison and it is a
18 clear instance of prosecutorial misconduct to offer his
19 testimony to the jury.

20 Mr. Chow has set forth a particularized need for this Court
21 to unseal and disclose the grand-jury proceedings in light of
22 untrustworthy testimony, prosecutorial misconduct and because
23 the interests of justice mandate such disclosure.

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CONCLUSION

Based on the foregoing, Mr. Chow respectfully requests that this Court unseal and disclose the grand-jury proceeding, which resulted in the Third Superceding Indictment.

Dated: November 6, 2015

Respectfully submitted,

/s/ CURTIS BRIGGS
CURTIS BRIGGS
J. TONY SERRA
TYLER SMITH
Attorneys for Defendant
KWOK CHEUNG CHOW

DECLARATION OF COUNSEL

I, CURTIS BRIGGS, declare:

1. I am an attorney licensed to practice in the State of California, and counsel of record for defendant KWOK CHEUNG CHOW herein.

2. The statements in the accompanying NOTICE OF MOTION AND MOTION TO UNSEAL GRAND JURY PROCEEDING ON THE THIRD SUPERCEDING INDICTMENT are true and correct to the best of my knowledge, based on my information and belief.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 5th day of November, 2015, at San Francisco, California.

/s/ CURTIS BRIGGS
CURTIS BRIGGS